JD–74–04
Exeter, NH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GRINNELL FIRE PROTECTION
SYSTEMS COMPANY

and

Cases 5–CA–25227 **RR**
5–CA–25406

ROAD SPRINKLER FITTERS LOCAL
UNION NO. 699, AFL–CIO

and

UNITED ASSOCIATION OF JOURNEYMEN
AND APPRENTICES OF THE PLUMBING AND
PIPE FITTING INDUSTRY OF THE UNITED
STATES AND CANADA

SUPPLEMENTAL DECISION

Statement of the Case

Richard A. Scully, Administrative Law Judge. On November 29, 2001, I issued a decision in this proceeding finding that the Respondent, Grinnell Fire Protection Systems Company, had violated Section 8(a)(1) of the Act by filing and prosecuting a lawsuit against the Charging Party Unions which involved causes of action that were without legal merit and were motivated by an intent to retaliate against the Unions for engaging in activities protected by the Act. That decision was based on the law as then interpreted by the Board pursuant to its reading of *Bill Johnson's Restaurant v. NLRB*, 461 U.S. 731 (1983). Subsequently, the Supreme Court issued its decision in *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002), which found the Board's standard for imposing liability pursuant to *Bill Johnson's* to be invalid because it could penalize completed lawsuits which were unsuccessful and filed with a retaliatory purpose even though they were "reasonably based." Following that decision, the Board remanded this case for further consideration in light of *BE & K*, including, if necessary, reopening the record to obtain additional evidence. All parties have indicated that they are satisfied with the existing record and have declined the opportunity to supplement it. The briefs filed by the parties on remand have been given due consideration.[1]

The Board had consistently interpreted *Bill Johnson's* to hold that if a lawsuit directed at

[1] The Charging Parties have moved to strike the brief filed on remand by counsel for the General Counsel, which argues that the *Bill Johnson's* allegations should be dismissed. They assert that the General Counsel is attempting to relitigate factual findings to which the General Counsel did not file exceptions. I do not agree. It is a legitimate exercise of prosecutorial discretion for the General Counsel to reevaluate his position in light of the *BE & K* decision by the Supreme Court. See *Consumers Distributing*, 274 NLRB 346 (1985). The motion to strike is denied.

protected conduct had been finally adjudicated and the plaintiff had not prevailed, its lawsuit was deemed meritless. If so, and it was determined that the plaintiff had acted with a retaliatory motive in filing the lawsuit, a violation of the Act was established. E.g., *Operating Engineers Local 520 (Alberici Construction)*, 309 NLRB 1199, 1200 (1992); *Summitville Tiles*, 300 NLRB 64, 65 (1990). In *BE & K*, the Supreme Court noted that the standard applied by the Board pursuant to *Bill Johnson's* could infringe on the First Amendment protection accorded lawsuits that are genuine and reasonably based. Even with the requirement of retaliatory motive, it could still penalize unsuccessful lawsuits directed at protected conduct which a petitioner believed was unprotected when that belief was subjectively genuine and objectively reasonable. It concluded that the Board's standard failed to exclude a substantial amount of genuine petitioning and was therefore invalid. The Court did not define a new standard, but did note that it was not deciding whether the Board may declare unlawful any unsuccessful but reasonably based suits that would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity, since the Board's standard does not confine itself to such suits. Two concurring opinions offer differing views as to what the standard may ultimately be found to be. It could be the same as the standard in antitrust litigation which prohibits only sham lawsuits that are both objectively baseless and subjectively intended to abuse process or it may include reasonably based lawsuits the employer brings as part of a broader course of conduct aimed at harming the unions and interfering with employees' rights under the Act. The Board has yet to define a new standard.

I have previously found that the Respondent's lawsuit against the Unions was retaliatory. Although the fact that the lawsuit was completely unsuccessful (U. S. District Judge Harvey having granted summary judgment in favor of the Unions on all issues) was a consideration in my finding it was retaliatory, lack of success was not the only basis. No new evidence has been presented on this issue. I adhere to my previous finding that it was retaliatory based on the disposition of the lawsuit and the other considerations enumerated in my previous decision, that it was directed at and tended to discourage protected conduct, that it sought extraordinary relief in the form of treble and punitive damages, and that in his deposition testimony company vice president Buchanan candidly admitted that it was intended to retaliate against the Unions.

My previous conclusion that the Respondent's lawsuit against the Unions was without merit was based on the district court's summary dismissal of the multi-count complaint in its entirety. At the time, under Board precedent, it was neither necessary nor appropriate for me to make an independent analysis of the evidence in that case. Under *BE & K*, however, the fact that the Respondent did not prevail in the lawsuit is not conclusive and does not in and of itself establish that it was baseless. Therefore, the lawsuit must be scrutinized to assure that genuine and reasonably based petitioning for redress is not punished. There being no additional evidence in the record, the only matter to be decided here is whether the lawsuit against the Unions, although retaliatory and unsuccessful, was reasonably based. If it was, there was no violation of Section 8(a)(1).

The General Counsel has reconsidered his position in light of *BE & K* and now joins with the Respondent in arguing that the filing and prosecution of the lawsuit did not violate the Act. This is not necessarily inconsistent with the position he has taken throughout the unfair labor practice litigation. From the outset, he asserted that only three of the seven counts in the Respondent's complaint, those based on state law, were retaliatory *and* baseless and should be enjoined pursuant to *Bill Johnson's.* With respect to the other four counts, he asserted that they were retaliatory and that, if they were finally adjudicated as lacking in merit or withdrawn, they too should be found to be baseless and violative of Section 8(a)(1).

Here, as in any unfair labor practice case, the General Counsel has the burden of

proving a violation of the Act. Under *BE & K*, at a minimum, that burden would appear to require him to establish that the Respondent lacked a reasonable basis in fact and/or law for filing and prosecuting its lawsuit. As noted above, from the outset the General Counsel had conceded that four counts of the Respondent's complaint could not be said to be baseless prior to adjudication by the district court. It would appear that the Unions also conceded this when they answered the complaint and engaged in discovery rather than moving for dismissal. I initially found that the record before me, prior to the district court's decision, indicated that there were genuine issues of fact with respect to the three state law counts of the complaint. It was only after extensive discovery by the parties that the case was adjudicated on motions for summary judgment. The district court ultimately found that the Unions had not engaged in any activities that were unlawful or unprotected by the Act. In doing so, it noted that despite a "veritable laundry list" of legal theories, the Respondent could not prove its case, which involved significant reliance on inferences that were based on "mere speculation and conjecture." While relevant, this does not establish that the Respondent subjectively believed that its lawsuit had no merit when it was filed and prosecuted or that it acted in bad faith in doing so. I find that neither the evidence in the record nor the reasonable inferences to be drawn therefrom establish that it did. Likewise, it does not establish that the Respondent would not have brought the lawsuit but for a desire to impose the costs of defending it on the Unions, regardless of the outcome.[2]

Based on the decision of the district court, I also find that none of the four counts of the Respondent's complaint that were dismissed on the merits has been shown to be objectively baseless or legally frivolous. On the first count, alleging violations of the Sherman Act, Grinnell contended that the withdrawal of participation in the targeting program from it was the result of an unlawful conspiracy between the Unions and NFSA and was intended to force Grinnell back into NFSA and/or prevent it from obtaining more favorable contract terms than NFSA members and was actionable under *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). It also asserted that such conduct was analogous to that found to constitute an anti-trust violation in *NCA v.NECA*, 498 F. Supp. 510 (D. Md. 1980). Although the district court ultimately found that the Unions acted alone in withdrawing targeting, Grinnell asserted that it did not know this to be the case when the lawsuit was filed and there is no evidence establishing that it did. While the district court also rejected Grinnell's anti-trust legal theories, their assertion cannot be said to have been frivolous.

The second count alleged that the Unions withdrew targeting from Grinnell to force it to engage in multi-employer bargaining through NFSA in violation of Section 8(b)(4)(ii)(A) of the Act. The allegations were consistent with those in the previous count of Grinnell's complaint and the decision in *Frito-Lay, Inc. v. Teamsters Local 137*, 623 F.2d 1354 (9th Cir. 1980) supports its legal theory on this issue. It is true that the charge it filed alleging this had been dismissed by the Regional Director for Region 5 and his decision was upheld on appeal; however, it cannot be said that those determinations were so conclusive as to foreclose Grinnell from seeking judicial consideration of its claim.

The third count sought damages from the Unions under Section 301 of the Labor

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[2] The direct evidence in the record concerning the Respondent's motivation in pursuing the lawsuit is minimal, no doubt, because the General Counsel and the Unions believed that the Respondent would not prevail and that would be sufficient to establish that it was baseless under *Bill Johnson's.* After this remand by the Board for reconsideration in the light of the Supreme Court's ruling in *BE & K*, no party sought to reopen the record to present additional evidence.

Management Relations Act (LMRA), alleging that they had violated no-strike provisions of a number of project agreements. This count was dismissed on the grounds that Grinnell had failed to exhaust the grievance and arbitration remedies contained in the applicable agreements; consequently, it could not pursue its Section 301 claims in the federal district court. The evidence establishes that each of the project agreements in question had a no strike clause and that the Unions engaged in strike activity at those projects. Grinnell asserted that it was entitled to damages for the violations of the no-strike agreements and that it did not have to utilize the grievance and arbitration provisions of the applicable contracts. The Unions argue that Grinnell could not have expected its claim "to survive even the most superficial judicial scrutiny given the axiom of federal labor law that Grinnell's admitted failure to exhaust applicable arbitration procedures was fatal to such claim," citing, the Supreme Court decision in *Drake Bakeries v. Bakery Workers*, 370 U.S. 254 (1962). Grinnell relies on a companion case decided by the Supreme Court on the same day, *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), which held that whether or not the employer must arbitrate depends on the language of the contract and the language of the contract in that case did not require it to do so. Grinnell contended that the language of the contracts in issue were arguably within *Atkinson* rather than *Drake Bakeries* because the language of the applicable grievance/arbitration provisions involved only employee-initiated grievances, did not cover breach of the no-strike provision, or made the grievance/arbitration procedure optional. While the district court, which resolved all doubts in favor of arbitration, found that Grinnell did not carry its "heavy burden" of establishing the inapplicability of the grievance/arbitration provisions, the evidence fails to establish that Grinnell's position was frivolous or that it did not act in good faith in asserting it.

The fourth count involved allegations that the Unions engaged in illegal coercion of construction contractors in violation of the secondary boycott provisions of Section 303 of the LMRA. The dismissal of this count turned a factual issue involving the agengy status of an individual and the court's conclusion that the unlawful picketing shown to have occurred was inconsequential. Again, this does not establish that Grinnell's position was frivolous or not asserted in good faith.

The merits of the state law allegations in the remaining three counts of Grinnell's lawsuit have never been adjudicated. I previously found that there were material issues of fact that precluded a determination that those allegations were baseless before there was a final adjudication establishing that they lacked merit. Under *BE & K*, even if there had been a judicial determination against Grinnell on those claims, it would not establish that they were baseless when filed or that Grinnell acted in bad faith in asserting them.

What the evidence shows is that the Respondent filed and prosecuted a lawsuit that, while wholly unsuccessful, appears to have had at least as much, if not more, merit than that which was the subject of the Court's ruling in *BE & K*. The employer's complaint in that case was dismissed as was its first amended complaint. A second amended complaint was also dismissed and the district court imposed sanctions under Rule 11 of the Federal Rules of Civil Procedure.[3] In the present case, the Unions answered the complaint and after extensive discovery, the creation of a voluminous record, and consideration of extensive legal arguments, the district court dismissed Grinnell's lawsuit. There was no finding that Grinnell did not act in good faith in prosecuting the lawsuit and no Rule 11 sanctions for filing a frivolous lawsuit were sought or imposed. Considering all of the foregoing, I find that although Grinnell may have had

[3] The imposition of sanctions was reversed on appeal after its counsel represented that decided claims had been realleged in the belief that it was necessary to do so to preserve them on appeal.

a retaliatory motive for filing and prosecuting its lawsuit, the evidence does not establish that it was either objectively or subjectively baseless. Consequently, its actions did not violate Section 8(a)(1) of the Act.

Conclusions of Law

The lawsuit which the Respondent filed and prosecuted against the Unions in the U.S. District Court for the District of Maryland was not objectively or subjectively baseless and did not violate Section 8(a)(1) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[4]

ORDER

The remanded complaint allegations are dismissed.

Dated Washington, DC August 3, 2004

Richard A. Scully
Administrative Law Judge

[4] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.